

Supreme Court, U. S.

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No. 76-1325

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN A. NARD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner contends that the district court's denial of his motion to withdraw his plea of *nolo contendere* without a hearing constituted an abuse of discretion.

On July 26, 1976, an indictment was returned in the United States District Court for the Western District of Pennsylvania charging petitioner with having wilfully failed to file income tax returns for 1967 and 1968, in violation of 26 U.S.C. 7203 (Counts 1 and 2), and with having wilfully attempted to evade and defeat income tax due and owing for the year 1968, in violation of 26 U.S.C. 7201 (Count 3) (R. 1a, 5a-7a).¹ On February 11, 1974, petitioner entered a plea of guilty to Counts 1 and 2 and a plea of *nolo contendere* to

¹"R." refers to the appendix filed by petitioner in the court of appeals.

Count 3 (R. 2a). The district court fined him \$10,000 and gave him a three-year suspended sentence on Count 3. The court also gave petitioner one-year suspended sentences on Counts 1 and 2, concurrent with the sentence on Count 3 (R. 34a, 35a).

On August 18, 1975, petitioner moved to withdraw his *nolo contendere* plea (R. 8a). The government filed a reply opposing the motion, and the district court denied the motion without a hearing (R. 14a, 17a). Petitioner did not appeal from this action of the district court. Subsequently, on August 25, 1976, petitioner filed a second motion to withdraw his *nolo contendere* plea (R. 18a-23a). On August 27, 1976, prior to any response by the government and without a hearing, the district judge denied petitioner's motion (R. 24a). The court of appeals affirmed by order (Pet. App. 1a-2a).

1. The decision whether to allow a post-sentence withdrawal of a *nolo* plea lies within the discretion of the district court. *United States v. Mainer*, 383 F. 2d 444, 445-446 (C.A. 3). Petitioner contends (Pet. 4-6) that the allegations in his motion, if proven, would constitute the "manifest injustice" that would entitle him, under Rule 32(d) of the Federal Rules of Criminal Procedure, to withdraw his plea; he argues that the district court abused its discretion in denying the motion without a hearing. Specifically, petitioner contends (Pet. 4) that he entered the *nolo* plea "on the mistaken belief, fostered by his counsel, that he could withdraw it at a later time."

But petitioner did not allege in his motion, which was prepared by counsel, that this belief was based on the advice of counsel, but simply argued in his motion that he believed

he had a right to withdraw the plea at a later date (R. 20a).² Thus, petitioner is at most alleging that he subjectively believed he could withdraw the plea whenever he chose. Such a belief justifies withdrawal of a plea only if it is objectively reasonable in the circumstances. *United States v. Barker*, 514 F. 2d 208, 224 (C.A. D.C.), certiorari denied, 421 U.S. 1013; *United States v. Hawthorne*, 502 F. 2d 1183, 1187 (C.A. 3). Since petitioner points to nothing which would indicate that his belief that he could withdraw the plea at a later time was reasonable, the court of appeals correctly held that "there were no material facts in dispute respecting the voluntariness of the plea, and no need for an evidentiary hearing" (Pet. App. 1a).

2. Petitioner further contends (Pet. 8-10) that there was no factual basis for the *nolo* plea because the trial judge did not explain to him the nature and consequences of such a plea. While Rule 11 of the Federal Rules of Criminal Procedure requires a factual basis for acceptance of a guilty plea, there is no similar requirement for *nolo contendere* pleas. *North Carolina v. Alford*, 400 U.S. 25, 35-36, n. 8; *United States v. Prince*, 533 F. 2d 205, 208 (C.A. 5). Indeed, such an inquiry would be contrary to the purpose of the *nolo contendere* plea, which is to avoid a determination of guilt. *United States v. Wolfson*, 52 F.R.D. 170, 175-176 (D. Del.), affirmed, 474 F. 2d 1340 (C.A. 3).

At all events, the trial judge fully explained the nature and consequences of the plea to petitioner. The trial judge explained that entry of a plea of *nolo contendere* meant that petitioner had no defense to the charge and petitioner

²*United States v. Shneer*, 194 F. 2d 598 (C.A. 3), upon which petitioner relies (Pet. 4), is therefore distinguishable because that case turned upon the existence of an allegation that the defendant's counsel affirmatively misled him.

responded that he was not offering any defense (R. 32a). Similarly, the judge advised petitioner of the sentence that would be imposed upon entry of the pleas, explaining fully the terms of probation (R. 27a-28a, 33a). Petitioner understood that by entering the pleas he was waiving the right to a trial and the right to subpoena witnesses in his behalf (R. 29a). Since petitioner was represented by retained counsel and he simultaneously entered two pleas of guilty (R. 26a, 27a), there is no basis for his assertion that he did not understand the nature of his plea.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.